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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 10

ALDEN WHITMAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Court of Appeals is reported at 281 F. 2d 59.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 7, 1960. The petition for certiorari was filed on August 5, 1960 and granted on June 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. May a defendant be convicted of violating 2 U.S.C. 192 when the alleged "question under inquiry" was not proved beyond a reasonable doubt and the government's definition of that question in this Court is inconsistent with the prosecutor's oral statement before trial?

2. Are questions relating to lawful political activity from 1935 to 1948 "clearly pertinent" to an investigation of "communist infiltration of the press" conducted in 1956?

3. May a witness be convicted for failure to answer questions about his associates in past lawful political activities, when the Committee fails to reveal to him either the source of its authority or the pertinency of the questions?

4. Did S. Res. 366, 81st Cong., 2d Sess. or S. Res. 58, 84th Cong., 1st Sess. validly authorize the hearing and the questions which petitioner declined to answer?

5. May a witness, who has fully and freely answered all questions put to him concerning his admitted past membership in the Communist Party, refuse, under the First Amendment to the Constitution, to answer questions concerning his associates in lawful political activity in the remote past?

6. Is an indictment for violation of 2 U.S.C. § 192 sufficient under Rule 7(c), Federal Rules of Criminal Procedure, which fails to state the authority of the Subcommittee, what the question under inquiry was, and how the questions asked the witness were pertinent to the question under inquiry?

CONSTITUTIONAL PROVISIONS AND STATUTORY MATERIALS INVOLVED

This case raises questions under the First, Fifth and Sixth Amendments to the United States Constitution and 2 U.S.C. 192, Senate Resolutions 366, 81st Cong., 2d Sess. and 58, 84th Cong., 1st Sess. and Rule 7(c), Federal Rules of Criminal Procedure. These provisions are all reprinted in Appendix "B", *infra*.

STATEMENT OF THE CASE

A. Proceedings Before the Subcommittee

Petitioner, Alden Whitman, since 1951 a copy reader employed by the New York *Times* (J.A.[1] 42), was interrogated by the Internal Security Subcommittee of the Senate Judiciary Committee on January 6, 1956 (J.A. 9, 12), after having been questioned in executive session on December 7, 1955. At the outset of his questioning, he submitted a letter which explicitly challenged the authority of the Subcommittee to conduct the inquiry, the legislative purpose of the interrogation, and the pertinency of his "private affairs, beliefs and associations . . . to any valid legislative inquiry". Gov. Ex. 8, *Hearings*, entitled "Strategy and Tactics of World Communism (Communism in New York)," p. 1733 (hereinafter referred to as *Hearings*). During his interrogation, these objections were orally renewed (*id.*, pp. 1734-38, 1741). Neither in its subpoena nor when Whitman appeared before it did the Subcommittee or its counsel state the basis of the Subcommittee's authority. As we demonstrate later, conflicting and inconsistent statements were made concerning the

[1] J.A. refers to the Joint Appendix in the Court of Appeals, nine copies of which are being filed with this Court.

"question under inquiry".[2] At no time was any effort made to clarify the pertinency of the questions asked to any purported subject matter under inquiry.

The petitioner testified fully concerning his own membership and activities in the Communist Party from 1935 to 1948, and answered the few questions asked relating to this subject. He declined to answer questions which would reveal the identity of other persons whom he had known in the Party, and it is the refusal to answer nineteen such questions which formed the basis for his subsequent citation and indictment for contempt.

The series of open hearings at which appellant testified ran from January 4-6, 1956. Fourteen of the eighteen witnesses called were present or former employees of the New York *Times* (J.A. 24-26). At the beginning, the Chairman stated that the hearings were the result of the testimony of Mr. Winston Burdett, an earlier witness, and that "We are not . . . investigating any newspaper or group of newspapers, we are simply investigating Communism wherever we find it" (*Hearings*, p. 1588).

The bulk of the questions which appellant refused to answer had no relationship to the press or newspapers. They involved employment in 1938 by the National Committee for People's Rights (*Hearings*,

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[2] Four prosecutions for violation of 2 U.S.C. § 192 grew out of the hearings, three of which are now before this Court. Yet the "question under inquiry" was not defined in the indictment and four trials and three appeals have succeeded only in compounding the confusion. In addition to this case, *Shelton* v. *United States* (No. 9, This Term) and *Price* v. *United States* (No. 12, This Term) are now here. A fourth witness, Peck, was acquitted. *United States* v. *Peck*, 154 F. Supp. 603 (DCDC).

pp. 1732, 1743); research on a book (*id.*, pp. 1745-46); the North American Committee to Aid the Spanish Democracy (*id.*, pp. 1746-48); Films for Democracy (*id.*, pp. 1748-49); Veterans of Democracy (*id.*, pp. 1749-50); and from the fall of 1939 to December 1941, the Russian News Agency, TASS, the New York Peace Committee, and the American Committee for the Protection of the Foreign Born (*id.*, pp. 1751-52). He testified that he had been employed by the Buffalo *Evening News* (*id.*, pp. 1728,1753) from December, 1941 to January, 1943; and by the New York *Herald Tribune* from January, 1943, until June, 1951 (*id.*, p. 1753), when he began his present employment. He testified that he left the Communist Party in 1948, though he had been rather inactive for some time prior thereto (*id.*, pp. 1730-31 1745). In each case, the questions asked petitioner which he declined to answer sought to elicit names, or information from which they could be identified, of persons who had been associated with him in the Communist Party, from 1938 to 1948.

The interrogation taken as a whole makes it clear that the Subcommittee was not interested in Whitman's activities as a Communist either before or after his newspaper career. Several questions dealt with his employment at the New York *Times* (particularly the consequences of his receiving the subpoena to testify). (*Hearings*, pp. 1729-31, 1754-55). Whitman was not asked whether, as a newspaper man, he performed services for the Party. Nor was he asked about espionage, although Sourwine subsequently identified TASS, where petitioner had been an office-boy, as "the major c ver for Soviet e pionage in many countries". (J.A. 12). Indeed, almost no questions related to Whit-

man's own party activities. The Subcommittee did not challenge his statement that these had been entirely innocent and that he himself had not taken part in any conspiracy against the Government of the United States. Nor did it doubt that he had severed all relations with the Party. It sought only to identify Whitman's associates.

B. Proceedings Before the District Court

Petitioner was indicted in the District Court for the District of Columbia, charged with nineteen refusals to answer under 2 U.S.C. § 192. The indictment stated that the hearings were held (J.A. 4-6) pursuant to "the Legislative Reorganization Act of 1946, Section 102(1)(k), 60 Stat. 818, and to Senate Resolutions 366 of the 81st Congress and 58 of the 84th Congress, and to the Standing Rules of the Senate". It failed to state what the question under inquiry was, and merely alleged that the defendant "was asked questions which were pertinent to the question then under inquiry" (*id.*). A motion to dismiss the indictment challenging its failure to set forth the authority of the Subcommittee, that the inquiry was within the Subcommittee's authority or to identify the question under inquiry, was denied (J.A. 7).[2]

On April 8, 1957, petitioner was tried before Curran, J. without a jury. In his opening statement, the prosecuting attorney stated that the question under inquiry was "investigation of the Communist activities in the New York area, in particular, in the field of

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[2] The motion also claimed that the indictment was void and illegal because the jury was biased because a majority of its members were government employees subject to loyalty security programs. This point is briefed by petitioner in No. 8, *Russell* v. *United States*, to which we respectfully refer the Court.

strategy and tactics of world communism . . . a very broad investigation, generally speaking, of the internal security and the national security of the United States" (Tr. p. 6, on file with this Court). The only Government witness, the Counsel for the Subcommittee, Mr. Sourwine, attempted to establish the authority of the Subcommittee by reference to a minute of the Judiciary Committee (Gov. Ex. 3) continuing the Internal Security Subcommittee (J.A. 15); on cross-examination he conceded that this minute was not available to the public and had not been made known to petitioner (J.A. 20-22). He further relied on the Committee calendar, but conceded that this does not constitute any official action of the Committee (J.A. 17-19) and a letter from him to members of the full Committee, stating who the members of the Subcommittee were to be (*id.*).

Sourwine testified that "we weren't investigating the newspapers" (J.A. 23); the "purpose of these inquiries was to further the Committee's design to learn all it could about the operations of the Communist Party in as many fields as it could go into . . . the Committee's authority is quite broad . . ." (J.A. 21). He conceded that it was not "sheer accident" that fourteen of the eighteen witnesses were, or had been, employed by the New York *Times* (J.A. 26). A motion for a judgment of acquittal at the close of the Government's case was denied (J.A. 26).

Petitioner testified in his own behalf. He testified fully about his background in the Communist Party and other organizations. (J.A. 38-43). He explained his reasons for joining the Communist Party:

> "Many people at the time were also troubled by the fact that there seemed to be a very heavy con-

centration of economic power in a rather few corporate and individual hands.

"Many people were also widely troubled by the fact that the existing major political parties seemed either unwilling or tardy, dragging their feet, in doing something to solve what on every hand was considered to be a major economic and social disaster for this country.

"As a person who was in college at the time and talked about it and met with others who were equally concerned, I couldn't help but feel that the solution—that there ought to be, under the circumstances, a wide and far-reaching solution to what were obviously economic and social and political imbalances in the country in order to preserve what I felt were the vital democratic traditions of this country.

"I felt at that time that from my readings in history, that third parties in the past had had an extremely energizing effect on the major parties in terms of bringing before the public and later by reason of that fact incorporation in major party programs of economic and social issues that otherwise might have la[in] neglected or might not have had the same impetus." (J.A. 43-44).

After objection had been sustained (J.A. 44-46), defendant offered to prove that "at no time did he become a member of the party with the objective of engaging in the forcible overthrow of the government by force or violence or that it was at any time represented to him that this was one of the purposes of the party." (J.A. 46). He further offered to prove as follows: His own activities in the party consisted principally of attendance at public meetings (at which political problems were discussed, but not espionage, sabotage, etc.) and occasionally selling subscriptions

to the *Daily Worker*. His membership in the party was not clandestine. Beginning in 1942 he worked during the evening hours and so became less active. His associates in the party, like himself, were not secret members, but were engaged in purely lawful political activities. In 1939 the Communist Party had adopted a constitution which provided in part that the party did not advocate overthrow of the government by force; it was regarded as a lawful political party by the general public, and there had been no judicial finding or legislation which characterized the party as an unlawful conspiracy. (J.A. 47-48)

He also testified and offered to testify further about his leaving the party: After the war, it became clear to Whitman that the party would not become the basis of a broad labor party; it also became much more doctrinaire and there was less opportunity for free discussion. The immediate incident that led to his leaving the party was that he had been asked to serve on the grievance committee of the Newspaper Guild at the Herald-Tribune, which was incompatible politically with the party, because the Communist group in the Guild had refused to cooperate with the union's administration, a policy which Whitman "simply couldn't tolerate." (J.A. 50-51).

Finally, Whitman stated the reason for his refusal to disclose the identity of persons he had known to be members of the Party, elaborating on his letter and testimony before the Subcommittee:

> "* * * I felt that by being compelled to answer the questions which I declined to answer, that I would be cast in the role of an informer. Now, like most Americans I have been brought up to despise and abhor the tattletale, the squealer and

the informer. I felt I would be violating the principles and tenets on which I have been brought up if I were asked to assume that role. * * * I felt, too, that I knew that I had engaged only, during the period of Communist Party membership, only in lawful activity. I knew that my associates had engaged only, during the period of Communist Party membership, only in lawful activity. I knew that my associates had engaged also in this purely lawful activity, and I felt that as a result of what I knew to be the case, that if I were to name names to be an informer, that the result would be terrible trouble on the shoulders, on the heads of people who were as innocent as I of any wrongdoing. I was confirmed in this belief by the fact that I knew of my own knowledge of people who had lost jobs, whose careers had been wrecked, whose families had been upset, whose children had been dislocated, purely because they had been exposed to the committee by somebody for what in its own time had been perfectly legal activity and I felt that it would be a mean and ignoble thing if I would be the vector, the agent to bri g destruction on people * * * I knew that, of course, it would be possible to save my own skin by giving the committee what it was pressing me for, namely, the names of other people, but I felt that I couldn't in all conscience do this, because it seemed to me that one of the great heritages and privileges that I had as a citizen in a democracy was that of personal responsibility for my acts. * * * I felt, sir, that as a matter of inner conscience here, that I could not disclose the names of innocent people in order to be of possible benefit to myself. I realized that as a result I would undoubtedly have to stand trial for contempt. The likelihood arose of going to jail, which I am not anxious to do, but I am even less anxious, sir, to become in my own eyes an ignominious person, and I feel deeply that I would utterly lose my

self-respect were I to violate the terms of my own inner integrity." (J.A. 52-54).

* * * * *

The Court found the defendant guilty on all counts (J.A. 55). The Court orally stated that "Inquiry as to the number of persons who were Communists and who they were, between 1935 and 1948, were pertinent to such investigation", and described the inquiry as one "into the extent of the activities of the Communist Party" (J.A. 55).[4] A motion for a new trial was denied (J.A. 59), and the defendant was sentenced to a fine of five hundred dollars and a six months suspended prison sentence (J.A. 62-63).

C. Proceedings in the Court of Appeals

Upon appeal, the Court of Appeals for the District of Columbia affirmed the conviction. 281 F. 2d 59. The Court principally rested on its opinions in *Shelton* v. *U. S.*, 280 F. 2d 701, *cert. granted*, 365 U.S. 857 and *Price* v. *U. S.*, 280 F. 2d 715, *cert. granted*, 366 U.S. 959, holding that the topic under inquiry was not too broad and indefinite, and relied on its opinion in *Deutch* v. *U. S.*, 280 F. 2d 691, *reversed*, 367 U.S. 456, to reject appellant's contention that questions about his

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[4] "The Congress of the United States has the power to investigate the history of the Communist Party, and in this connection, it has the power to determine who are members of the Communist Party. The committee has the power to investigate the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities."

"Inquiry as to the number of persons who were Communists and who they were, between 1935 and 1948, were pertinent to such investigation." (J.A. 55).

associations were not pertinent and invaded his rights under the First Amendment.

In dealing with appellant's argument that the questions were too remote in time to be pertinent the Court found at least Questions 1 through 8 to be sufficient. Then, focussing particularly on Question 8, the Court said :

> "Moreover, one of the questions--'Did you tell anyone you were quitting the Party'—clearly pertained to the mechanics of Party membership at a time not so distant as to be irrelevant to possible practices. Given the presently considered conspiratorial nature of the Party, a common belief of which Whitman does not claim ignorance, it would seem that the questions in counts one through eight were clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period following Warld War II, and such an inquiry was not without relevance to Party activities in 1956, when the Subcommittee questioned Whitman." 281 F. 2d at 61.

SUMMARY OF ARGUMENT

I

A. "The starting point must be to determine the subject matter of the subcommittee's inquiry" *Wilkinson* v. *United States,* 365 U.S. 399, 407. Unless that subject is established, the Government can not fulfill its obligation under 2 U.S.C. § 192 to prove the pertinency of the individual questions. *Deutch* v. *United States,* 367 U.S. 456; *Sinclair* v. *United States,* 279 U.S. 263. Nor can it prove, as it must, the authority of the Committee to conduct the inquiry. *United States* v. *Rumely,* 345 U.S. 41; *Sacher* v. *United States,* 356 U.S. 576.

In this Court the Government nominates "Communist infiltration of the press" as the subject under inquiry. However, Sourwine, the Committee counsel, who made up the list of witnesses and was the chief inquisitor, emphatically denied that this was the subject under inquiry when the first witness during the hearings so contended. Further, when a subsequent witness demanded to know the question under inquiry Sourwine replied "Communist activity." During the course of the hearings at trial and on appeal the Committee, its representatives, the prosecuting attorney and the courts below have given many and mutually inconsistent views of what the question under inquiry was. These are compiled in Appendix A, *infra.* Under these circumstances the Government clearly failed to establish the question under inquiry or the pertinency of the individual questions beyond a reasonable doubt as it was required to do in order to obtain a conviction.

In addition to the failure of proof there is a substantial and prejudicial variance between the prosecution's position at trial and the Government's contention in its opposition to certiorari. In his opening statement the Assistant United States Attorney advised the Court and the defendant that it was the Government's position that the question under inquiry was as broad as the authorizing resolution. The Government may not, therefore, contend here for a lesser topic "Communist infiltration of the press." The prosecutor's opening statement, like a bill of particulars is binding. *United States* v. *Neff,* 212 F. 2d 297 (CA 3); *cf. United States* v. *Fruehauf,* 365 U.S. 146. If the Government may not adopt at this stage a new justification for the admissibility of evidence (*Giordenello* v. *United States,* 357

U.S. 480; *Shepard* v. *United States*, 290 U.S. 96) it plainly may not change its theory as to how it will establish an undisputable element of the defense.

B. Even if it be assumed that "Communist infiltration of the press" was the question under inquiry, the individual questions dealing with petitioner's past lawful political activity were not pertinent to that topic. *Sacher* v. *United States, supra,* requires that questions be "clearly pertinent." The statutory provision for pertinency is the chief protection of the witness' privacy. *Sinclair* v. *United States, supra. United States* v. *Orman,* 207 F. 2d 146 (CA 3). Where, as here, the inquiry touches "an area of speech, press and association" (*Scull* v. *Virginia,* 359 U.S. 344, 352) the courts must "be particularly careful to check unlawful lines of inquiry." *United States* v. *Orman, supra,* at 158.

Questions about lawful political activity are plainly irrelevant to the present efforts to subvert the press. *Wieman* v. *Updegraff,* 344 U.S. 183; *Schware* v. *Bar Examiners,* 353 U.S. 232. Since the questions here covered a period of seven to twenty years prior to the inquiry they were also too temporally remote to be pertinent. Compare *Deutch* v. *United States, supra; Bowers* v. *United States,* 202 F. 2d 447. (CADC)

Questions 3, 4 and 5 were answered. Questions 3 and 10 were so vague that a witness could not constitutionally be compelled to answer them. As to Question 8—"Did you tell anyone that you were leaving the Party"—petitioner invoked the privilege of confidential communication between husband and wife. In these circumstances the claim of privilege clearly indicated that he had told his wife and was so understood by the Committee. Additionally, the claim was well taken.

Question 8 also illustrates the Government's failure to prove pertinency. The District Court and the Court of Appeals had conflicting theories by which they sustained the pertinency of this question. The standard applied by the Court of Appeals, that the question was clearly pertinent to another subject which, in turn, was not irrelevant to the question under inquiry, is inconsistent with the "clearly pertinent" formulation of this Court in *Sacher* and would, if adopted, vitiate the requirement of pertinency.

II

In view of the confusion as to the question under inquiry before the Committee, on trial, and on appeal, it is plain that the question "was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance." *Watkins* v. *United States*, 354 U.S. 178, 214; *Scull* v. *Virginia*, 359 U.S. 344, 353. The Government's contention that petitioner knew the subject under inquiry is utterly without merit. The explanations given petitioner were conflicting and "Communist infiltration of the press" was not one of them. His own statement to the Committee shows that he thought that "beliefs, associations, and activities of individuals who are or have been connected with newspapers" was the topic. Such an investigation would plainly have violated the First Amendment and the Committee stoutly denied that this was its purpose. Over one-half the questions which petitioner declined to answer had no relation to the press. Compare, *Watkins, supra*, 354 U.S. at 213-14. In short, the Government attributes to petitioner "gifts which mankind does not possess" in asserting

that the subject appeared to him with undisputable clarity at the time of the hearings as *Watkins* requires.

Assuming that it is necessary that a witness make a pertinency objection before the Committee in order to invoke the *Watkins-Scull* principle at trial, petitioner's statement was clearly adequate. *Hearings* p. 1733. His doubts as to why he had been called and the pertinence of the questions were repeated orally. (*Id.* at 1735). This objection was clearer than in *Watkins*, 354 U.S. at 185. No particular form of words is required. Compare, *Quinn* v. *United States*, 349 U.S. 155.

III

A. The Subcommittee was not authorized to conduct this particular inquiry. Neither the Legislative Reorganization Act of 1946 nor the Senate Resolutions which are adumbrated in the indictment gave any power directly to the Subcommittee. When Senate Resolution 58 (84th Cong. 1st Sess.) was under consideration the Senate Rules Committee struck the reference to the Internal Security Subcommittee and substituted therefore "The Judiciary Committee or any subcommittee thereof."

The Judiciary Committee's only resolution regarding this subcommittee did not authorize this inquiry. Sen. Resolutions 366 and 58 are too vague to show whether the Senate authorized it.

The Subcommittee also never met to vote that this investigation be undertaken, although its rules, which were adopted with the knowledge of the Judiciary Committee, so required. The Subcommittee is bound to follow its own rules. Compare *Vitarelli* v. *Seaton*, 359 U.S. 535. Even in the absence of such a rule a sub-

committee does not have power to compel testimony unless delegation from the appropriate House of Congress is clear and unbroken and unless the inquiry is authorized by a vote of the subcommittee's own membership.

B. The holding of *Watkins* v. *United States*, 354 U.S. 178 requires as a corollary that a witness may not be convicted for a violation of 2 U.S.C. § 192 unless he is apprised of the basis of the investigating committee's authority to question him. That authority, like pertinency, is an element of the offense, of which he must be advised in order to determine whether he is within his rights in refusing to answer, as due process requires.

The Committee in its subpoena or at the hearing failed to reveal either 1) the source of its authority or 2) the relationship of the inquiry and the individual questions to that authorization. At no time did any member or representative of the Subcommittee refer to the Senate resolutions relied on by the Government in the indictment or to any other alleged charter of authority.

Since petitioner did not know the question under inquiry he could not determine whether the investigation was within the Committee's authority. Even if he had known that question and had been pointed to Senate Resolutions 366 and 58 these are so vague that he could not have determined whether they encompassed any given topic or individual questions.

In his prepared statement and orally petitioner clearly and insistently questioned the Committee's authority to interrogate him as it did. To convict him without the benefit of an explanation would violate the due process clause of the Fifth Amendment.

IV

Petitioner's conviction also violates the First Amendment. Unlike petitioner in *Barenblatt* v. *United States* 360 U.S. 109, he testified fully and freely about his own activities and balked only at giving information which would expose his associates to injury. This distinction is critical in terms of the associational rights which the First Amendment guarantees. The injury to his associates which he risked imprisonment to avoid, parallels that which was recognized as a defense in *NAACP* v. *Alabama*, 357 U.S. 449 and its progeny. *NAACP* can not be distinguished on the basis that this case involves the Communist Party because the test is whether the conduct was clandestine. *Communist Party* v. *Control Board*, 367 U.S. 1, 101-102. Petitioner and his associates took part in no secret or conspiratorial activities.

Since petitioner could reveal nothing which would help the Committee ferret out present subversive activities its interest in compelling him to be an informer is trivial almost to the point of nonexistence. His conscientious refusal to become an informer, however, is a right deserving the highest degree of constitutional protection.

Here, as in *Board of Education* v. *Barnette*, 319 U.S. 624 the State should not be permitted to extort an act repugnant to the citizen's principles and tenets. There, the conscientious objection of school children to saluting the flag was held to outweigh the interest in national unity during war time. The public interest here is considerably less than in *Barnette*, but petitioner's scruples against informing (J.A. 52-54) rise to at least equal dignity to those which *Barnette* sustained.

To uphold petitioner's conviction would extend *Barenblatt* beyond "balancing" to an absolute holding that any question about Communist Party membership is permissible under the First Amendment. This Court has never so held. We trust that while it sits it will never allow First Amendment rights and the conscience of the citizens to be trampled at the instance of a congressional committee on as insignificant a showing of public interest as was made in this case.

V

Rule 7(c) of the Federal Rules of Criminal Procedure embodies two constitutional principles: 1) the right of a defendant "to be informed of the nature and cause of the accusation" and 2) his right to be tried only upon a finding by a Grand Jury that probable cause exists for his conviction. The indictment in this case failed to satisfy either of the purposes of Rule 7(c).

The indictment did not define the question under inquiry, the pertinency of the individual questions, or the authority of the Subcommittee. *Wilkinson* v. *United States*, 365 U.S. 399, 409 enumerates five issues which can only be analyzed if the subject under inquiry is known. At least two of these are essential elements of the offense which the Government must prove. In *Deutch* v. *United States*, 367 U.S. 456, the Court's identification of the question under inquiry was critical to the result. Plainly, therefore, a witness has a right to know the Government's theory as to the question under inquiry before trial.

An indictment which is silent as to the question under inquiry also denies the defendant a right to be tried only upon a finding by a grand jury that reason-

able cause of a violation exists. The grand jury, like the court and the defendant, can not evaluate pertinency unless the question under inquiry is known. It is readily inferred from the prosecutor's position at trial that the Grand Jury did not indict on the theory that "Communist infiltration of the press" was the subject by which pertinency would be measured. Compare, *Stirone* v. *United States*, 361 U.S. 212.

The confusion in this case concerning the basis of pertinency of Question 8 amply illustrates why the indictment should also state the alleged basis of pertinency of the individual questions.

The indictment must fully state the authority of the Subcommittee. *United States* v. *Lamont*, 236 F. 2d 312 (CA 2). The sources cited in this indictment were insufficient to sustain the inquiry. See Part 3 A, *supra*.

Prosecutions arise on referral from the investigating committee, which must know the question under inquiry, the pertinency of the questions and its own authority. No hardship would be entailed in requiring completeness in indictments. Rather it is a necessity for according defendants in contempt cases the same constitutional rights as other criminal defendants.

ARGUMENT

I. THE CONVICTION MAY NOT STAND BECAUSE THE GOVERNMENT HAS FAILED TO ESTABLISH THE "QUESTION UNDER INQUIRY", OR THE PERTINENCY OF THE INDIVIDUAL QUESTIONS.

A. The Question Under Inquiry

In a prosecution under 2 U.S.C. § 192, the Government has the "duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee." *Deutch* v. *United States*, 367 U.S.

456, 468 and cases cited. It failed to meet that burden here because it never accomplished the "first step in proving that component of the offense [which] was to show the subject of the subcommittee's inquiry." *Deutch, supra,* at 469.[5] It was 'incumbent upon the United States to plead and show that the question[s] pertained to some matter under investigation". *Sinclair* v. *United States,* 279 U.S. 263, 296-97.[6]

It is true in this case, as it was in *Watkins* v. *U. S.*, 354 U.S. 178, 214, that, "having exhausted the several possible indicia of the 'question under inquiry' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent".

For the first time, in its brief in opposition to certiorari, the Government now states that the question under inquiry was "Communist infiltration of the press" (Opp. cert., pp. 11, 12, 18, 19); see also Opp. cert., *Shelton* v. *U. S.*, No. 9, This Term, pp. 11, 12, 14-15; Opp. cert., *Price* v. *U. S.*, No. 12, This Term, pp. 13, 14. In the course of the hearings, the following colloquy took place between Mr. Sourwine, Counsel for the Committee (who had prepared the list of witnesses, did most of the interrogating, and in the eyes of the Committee members was in full charge of the hearings, J.A. 24, *Hearings,* p. 1718; and see brief for petitioner

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[5] "Evidence is *always a relative term.* It signifies a relation between two facts, the 'factum probandum', or proposition to be established and the 'factum probans', or material evidencing the proposition." Wigmore, *Evidence* § 2 (3d ed., 1940) (emphasis in original).

[6] The inquiry must, of course, be authorized. *United States* v. *Rumely,* 345 U.S. 41, 42-43; *Sacher* v. *United States,* 356 U.S. 576, 577. Thus, the topic under inquiry must be proven also in order to establish the subcommittee's authority.

in *Shelton* v. *U. S.*, No. 9, This Term, pp. 6, 7) and the first witness in this series of hearings, James S. Glaser:

> "Mr. Glaser. . . . The announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication.
>
> Mr. Sourwine. Who announced that, Mr. Glaser?
>
> Mr. Glaser. Beg pardon?
>
> Mr. Sourwine. Who announced that?
>
> Mr. Glaser. I read it in the New York Times.
>
> Mr. Sourwine. For your information, the Committee has made no such announcement. *It is not accurate*, and you heard the statement of the Chairman this morning, concurred in by all members of the Committee who were present." *Hearings*, p. 1616, emphasis supplied.

In the course of the interrogation of the witness Jerry Zalph, the following exchange occurred:

> "Mr. Zalph. Mr. Chairman, I would like to press my question as to the subject of this inquiry, if I may. I don't feel that was answered . . . .
>
> Mr. Sourwine. The subject matter of this Committee's inquiry is Communist activity and the Committee is proceeding on the basis of previous testimony and information furnished it with respect to Communist activity". *Hearings*, p. 1652,

In Appendix A to this brief we catalogue the conflicting positions taken by the members of the Subcommittee, its counsel, the prosecuting attorney and the courts below on the elusive question under inquiry.

At the outset of the hearing, the Chairman announced that the hearings were "a subsequent chapter to the Burdett testimony", *Hearings*, p.

1587. Burdett, a witness who had appeared during the preceding year, had not referred to appellant; indeed, only one of the witnesses called during the January hearings had been identified by him. Burdett's testimony dealt with his membership in a Communist Party cell at the Long Island Daily Press in 1937 to 1940 and his espionage activities in Europe from 1940 to 1942, when he left the party. (*Hearings*, Part 14 pp. 1359-1363).

Senator Hennings, on the other hand, wished "to make it abundantly clear, if that is the purpose of counsel, and if it is the purpose of the Committee that this is not in any sense an attack on the free press of the United States." (*Hearings*, p. 1588). He added that "of course the Committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency." (*id.* p. 1587). The Chairman and Senator Watkins expressed agreement with Senator Hennings statement. (*Id.*)[7]

At the opening of the hearings on the day Whitman testified, Senator Eastland again made a statement, this time referring to the testimony of Clayton

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[7] In the context of the entire discussion we do not believe that the Chairman's acquiescence in Senator Hennings' remarks indicates a purpose to limit the inquiry to Communist infiltration of the press. Senator Eastland's additional comments suggest rather that his attention was focussed on Senator Hennings' disclaimer—in which he joined—"of any attack upon any one newspaper, upon any group of newspapers as such". (*Hearings*, p. 1587) For the Chairman said "We are simply investigating communism wherever we find it." This interpretation is confirmed by the Chairman's comments to witnesses, (e.g. to Whitman, *Hearings* pp. 1737, 1738), Sourwine's statements (*Id.* pp. 1616 and 1652) and Senator Eastland's own testimony at the *Peck* trial. Transcript in *United States* v. *Peck*, Cr. 1215-56, p. 235 (D.C.D.C.).

Knowles who named neither Whitman, Shelton or Price.[8]

In the course of the questioning of petitioner he was told that the names of his associates in a Communist cell during the 1930's not shown to have had any relationship to the press were "the very heart of this inquiry". *Hearings*, p. 1737.

The indictment charging petitioner did not identify the question under inquiry.

In his opening statement, the prosecuting attorney stated this was "an investigation of the Communist activities in the New York area, in particular, in the field of strategy and tactics of world communism" (Tr. p. 6). The Government's only witness, Committee Counsel Sourwine, testified that "we weren't investigating the newspapers and we weren't going into matters which were unlawful under the laws of the United States" (J.A. 23).

The District Court rested on the ground that the Committee "has the power to investigate the growth or the decline of the Communist Party . . . as part of an inquiry into the extent of the activities of the Communist Party" (J.A. 55), obviously confusing the issue of the powers of the Committee with the problem of the question under inquiry.

The Court below declared that one of the questions was proper as related to "the mechanics of Party membership" (281 F. 2d 59, 61); at no other time has it been suggested that this was the question under inquiry.

The majority of the counts stated in the indictment were founded on refusals to answer questions which have no discernible relation to the press (Counts 2,

[8] Knowles' testimony is reported at *Hearings*, 1635-1645.

9-19), and related to periods when petitioner was in no way connected with any newspaper. As in *Watkins* v. *U. S.*, 354 U.S. 178, 213-214, "When almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the Subcommittee was not Communism in labor". Where over one-half the questions asked appellant have no remotest relation to "Communist infiltration of the press", the inference likewise becomes strong that this was not the question under inquiry.

As the Court again emphasized in *Deutch* v. *United States*, 367 U.S. at 471, 2 U.S.C. § 192 is a criminal statute, "and the courts must accord to defendants every right which is guaranteed to defendants in all other criminal cases." (Quoting *Watkins*, supra at 208) "An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt." *Christoffel* v. *United States*, 338 U.S. 84, 89. See also *Heikkinen* v. *United States*, 355 U.S. 273, 276. Whatever else may be in doubt on this record, one thing is clear: It simply will not sustain the proposition that the Government has proven that "Communists infiltration of the press" was the subject under inquiry at these hearings. To be sure, there is *some* evidence to that effect. But, as we have seen, the preponderance of the evidence—far more than enough to raise a reasonable doubt—refutes this theory. Most compelling, of course, is Sourwine's categorical disclaimer of that suggestion, and his unqualified assertion that "Communist activity" was the subject under inquiry.[9] (*Hearings*, pp. 1616, 1652)

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[9] It is worth recalling that this is the person who drew up the witness list, asked the majority of the questions, and who, in the eyes of the committee members themselves, was conducting the investigation. (J.A. 24, *Hearings*, p. 1718)

Manifestly, a witness may not be punished under a statute which postulates "pertinency to the question under inquiry" as an element of the offense, under a theory of pertinency unequivocally disavowed by his chief interrogator.

Quite aside from its failure of proof, the Government is foreclosed from now supporting this conviction on the theory of a particular, limited question under inquiry. The prosecutor said nothing about "communist infiltration of the press" in his opening statement; rather he made it clear that the government was proceeding on the theory that the committee was conducting "a very broad investigation, generally speaking of the internal security and the national security of the United States". (Tr. p. 6) It was on this basis that the Government tried its case, and, what is more important, on this basis that the defendant tried his. The Sixth Amendment gives a defendant the right "to be informed of the charges against him", and it is a violation of due process to convict a defendant on a ground not charged. *De Jonge* v. *Oregon*, 299 U.S. 353; *Cole* v. *Arkansas*, 333 U.S. 196. In this case petitioner was not advised of the subject under inquiry by the indictment. We shall urge below that this was fatal error. But if the defendant cannot look to the indictment the Constitution requires that he be informed otherwise, to enable him to defend. The bill of particulars or the opening statement serves this purpose. In *Shelton*, No. 9, the same prosecuting attorney gave an oral bill of particulars explicitly disavowing any question under inquiry narower than the authorizing resolution. The prosecution is bound by the bill of particulars, *United States* v. *Neff*, 212 F. 2d 297, 309 (C.A. 3). The opening statement does not differ in

principle. Cf. *United States* v. *Fruehauf*, 365 U.S. 146, 157-58:

> "Nor does the record raise questions concerning the sufficiency of the indictment . . . For this is not a case in which the District Court has construed the allegations of an indictment, or limited the scope of the Government's presentation by construction of a bill of particulars or the prosecutor's opening statement."

On two occasions this Court prevented the Government from supporting the admission of important evidence here on a theory other than that on which it had relied at the trial. *Shepard* v. *United States*, 290 U.S. 96; *Giordenello* v. *United States*, 357 U.S. 480. As this Court said in *Giordenello*:

> "We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into this case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time." Id. at 488.

This reasoning is applicable here *a fortiori*, for the government has changed the theory by which petitioner's guilt is to be judged. The question under inquiry is central to the whole case. See the discussion at pp. 20-21, 60-63. Under these circumstances we do not think prejudice need be shown. Compare *Kotteakos* v. *United States*, 328 U.S. 750. In any event, preju-

dice is clear enough here. Had defendant known that the Government was resting its case on the proposition that "Communist infiltration of the press" was the question under inquiry, he could have cross-examined Sourwine on the basis of his contrary statements at the hearing. He could have introduced members of the committee to determine whether they thought that to have been the topic of their investigation. (Compare *United States* v. *Peck*, n. 2, *supra*, where Senator Eastland testified.) Defendant, who it is now claimed, knew this to be the subject (opp. cert., pp. 12, 17, 19) could have attested to his mystification. Above all, the confusion on this issue, which has endured past trial and appeal, would have been dispelled at the outset.

B. The Questions Which Petitioner Declined to Answer Were Not Pertinent to the Subject Under Inquiry

For the purposes of this discussion, we must assume the Government's position that the question under inquiry was "Communist infiltration of the press". The Government now appears to concede that the majority of the counts on which appellant was indicted and convicted were not pertinent to this topic (Counts 9-19). It is our basic position that questions, relating to matters occurring from eight to sixteen years prior to the investigation, dealing with matters which, it is not disputed, were purely lawful political activities, engaged in prior to the establishment of the Subcommittee, the passage of the Internal Security Act of 1950 and the decision of this Court in *American Communications Association* v. *Douds*, 339 U.S. 382, as part of an inquiry focussed on a great American newspaper, were not designed to elicit information pertinent to this subject matter.

In *Sacher* v. *United States*, 356 U.S. 576, 577 this Court laid down the rule, which is no more than another facet of the Government's duty to prove all elements of the offense beyond a reasonable doubt, that the questions must be "clearly pertinent" to the subject under inquiry.

The importance of a strict standard of pertinency is best understood in terms of its purpose to protect individuals against "unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs". *Sinclair* v. *United States*, 279 U.S. 263, 292. Accord: *McGrain* v. *Daugherty*, 273 U.S. 135, 176-77; *Bowers* v. *United States*, 202 F. 2d 447, 448 (CADC). As Chief Judge Biggs wrote for the Court of Appeals for the Third Circuit, *United States* v. *Orman*, 207 F. 2d 148:

> "The individual must rely, for the protection of his privacy upon the requirements of pertinency . . ." *Id.* at 158.

From this principle Judge Biggs derived the following corollary:

> "When an investigation enters a field to which the First Amendment is applicable, courts will be particularly careful to check unlawful lines of inquiry." *Id.*

This formulation, by requiring a high degree of pertinency in "a field to which the First Amendment is applicable," in effect balances the need of Congress to expand the lines of inquiry beyond the immediate subject and the nature of the right of privacy claimed by a witness. Such balancing in the application of a rule of privilege is not novel. *Roviaro* v. *United States*, 353 U.S. 53, 62. To strike such a balance in favor of First

Amendment rights is consistent with prior decisions, e.g. *Smith* v. *California*, 361 U.S. 147 and cases cited id. at 150-51.[10]

Barenblatt v. *United States*, 360 U.S. 109, is not inconsistent with the *Orman* formula or its application in this case. While the *Barenblatt* balancing test has certain surface similarities, it was developed in the unique context of "constitutional adjudication" id. at 125, and of "constitutional legislative power" id. at 133 and see id. at 127. Pertinency, as a statutory condition for a contempt conviction, was separately considered, before the constitutional balance was undertaken. *Id.* at 125. The pertinency of Barenblatt's own membership in the Communist party was deemed "clear beyond doubt." *Id.* at 125. This was followed in *Wilkinson* v. *United States*, 365 U.S. 399, 413. The *Sacher* decision, *supra* which requires questions to be "clearly pertinent" was thus left undisturbed. The *Orman* formula comes well within *Sacher*; its chief utility is in its emphasis on the special need to assure against intrusion into the witness' privacy when his First Amendment rights might be jeopardized. This Court has recently described the intimate connection between the constitutional guarantees of privacy and freedom of expression. *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-29.

We understand *Scull* v. *Virginia*, 359 U.S. 344 to have given implicit approval to the test which *Orman*

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[10] "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression." Id. at 150-51.

The same principle has been applied in interpreting statutes, and not merely to avoid constitutional doubts. See, e.g. *Eastern R. Conf.* v. *Noerr M. Lines*, 365 U.S. 127, 137.

succinctly formulated. *Scull* followed *Watkins* v. *United States,* 354 U.S. 178, in holding that a witness must be informed of the Committee's power to compel his testimony. 344 U.S. at 345 and 353. However, the Virginia statute under which Scull had been convicted, unlike 2 U.S.C. § 192 imposed no pertinency requirement. Thus this Court must have viewed pertinency as a constitutional predicate of the committee's authority at least in the area of the First Amendment. Pertinency is a condition of the "compelling state interest" which must be "clearly shown" if "areas of individual liberty" such as speech, press and association are to be invaded. id. at 352-53.

While, as stated, we believe the *Orman* rule to have been adopted implicitly in *Scull,* we envision two salutary consequences if it is expressly established as a guide to the lower courts: (1) Congressional committees will be discouraged from rummaging around pointlessly in the private lives of citizens, because the sanctions of the contempt statute will be unavailable; (2) witnesses will be able to judge whether they may lawfully remain silent (and counsel will be able to advise them) according to a meaningful and workable standard. The record in this case, and in other cases which have come before this Court evidence all too plainly that some Congressional committees have failed to keep within any discernible bounds of pertinency or relevancy, despite the fact that their investigations are at the outskirts of, when they do not actually intrude upon, First Amendment freedoms. The second point "attains proportion when viewed from the standpoint of the witness who appears before a congressional committee." Cf. *Watkins supra* at 208. He must judge at his peril (*Sinclair* v. *United States, supra* at

299; *Braden* v. *United States*, 365 U.S. 413, 437-38) between abandoning First Amendment rights (*Scull*, supra at 353) and possible imprisonment. He acts in a charged atmosphere, under enormous emotional tension;[11] the assistance which counsel is allowed to give him is severely curtailed.[12]

While we accept, as we must, the *Barenblatt* test for purposes of constitutional adjudication, it cannot serve as a standard by which the layman, even under the most salutary circumstances can judge his rights. We do not understand that to be its purpose. Plainly, a witness, or his counsel cannot weigh "the competing

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[11] As Senator Hennings noted, a witness "may be seriously damaged in his own personal and professional life." *Hearings*, p. 1719. (See also the eloquent comments of witness *Glaser*, *id.* pp. 1615-16, 1619.) Reporters and photographers and sometimes television cameras and klieg lights crowd the committee room. (The very purpose of an open hearing is publicity.)

[12] Counsel is not permitted to address the Committee to make objections; these must come from the witness himself. Counsel may not volunteer advice, the witness requests permission to confer. (See *e.g. Hearings*, pp. 1730, 1731, 1732, etc.) Counsel is not even immune from attack by the Committee. The record in *Shelton* affords a shocking but apposite example. In the guise of testing the witness' credibility at the closed hearing, committee counsel inquired whether he knew his attorney, Osmond K. Fraenkel, a distinguished member of the Bar, to be a Communist. (R. No. 9, p. 59). That incident is particularly instructive here, for Senator Hennings said, on objection to this question:

> "The Chair might observe sir, that it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant and what is pertinent to the subject matter of this inquiry."

Whereupon Sourwine continued to press for an answer. (R. No. 9, p. 60.)

private and public interests at stake in the particular circumstances shown." They lack the data to analyze the needs of the committee or national security. See Senator Hennings' statement at n. 12 *supra*. The witness' main protection must come from the pertinency standard which Congress imposed.

That, by contrast, is a standard by which men live and make decisions daily. To lawyers particularly, problems of pertinency are a staple. Wigmore has declared it to be axiomatic "for any system of evidence purporting to be rational" that *"None but facts having rational probative value are admissible."*[13] Any meaningful test of pertinency must impose at least a standard of rationality. The *Orman* and, we believe, *Scull* decisions require a particularly high degree of rational connection between the question and the subject under inquiry where the inquiry touches upon First Amendment rights. A more precise formula cannot be rendered. "The difficulty is that we cannot escape, in relation to the problem, the use of undefined defining terms." * * * "But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standards does not wholly fence it in." *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

The investigation into petitioner's associations in past lawful political activity clearly entered an area to which the First Amendment is applicable. *Scull* v. *Virginia*, 359 U.S. 344, 352. Not even *Barenblatt* denied that the First Amendment is germane—it merely held that it was not controlling "upon the particular record before us," 360 U.S. at 125 *et seq.*

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[13] I Wigmore, *Evidence* § 9, p. 289 (3 ed., 1940) (emphasis in original).

Further, this entire inquiry turned predominantly about the New York *Times*. That newspaper was under no illusions concerning the purpose of the inquiry, for reasons which it set forth at length editorially (J.A. 56). It said that

> "It seems to us quite obvious that the Eastland investigation has been aimed with particular emphasis at the *New York Times*."

The curious use made by the Committee of the Matusow affidavit, with reference to alleged employment of Communists by the New York *Times*, is revealing (J.A. 29-31).[14] Extensive citation of authority is scarcely necessary to demonstrate that efforts to coerce the editorial policy of a great newspaper intrude on First Amendment rights. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250.

If the question under inquiry was that now asserted by the Government, "Communist infiltration in the press," the pertinent question to ask would be, "Do you have any present information about communist infiltration of the press?" If the answer were "No," the witness should be dismissed, if "Yes," further inquiry would be proper. Nothing even approaching this question was asked. Having ascertained that the witness had no information more recent than 1948, the Committee nonetheless continued its questioning into past irrelevancies in a transparent effort to compel the witness to choose between a contempt citation and an ig-

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[14] The Committee devoted considerable attention to the effect of its subpoena on the employment of petitioner, and other witnesses from the *Times*. Their private conversations with their employers were subjected to minute scrutiny. They are cited in Brief for Petitioner in *Shelton* v. *United States*, No. 9 at p. 54.

noble role as an informer. It is true that one question, that in Count 7, can be read to inquire whether any persons who had been members of a cell with petitioner prior to 1948 were presently employed at the Herald Tribune. But neither this, nor any other question asked the petitioner, sought to elicit from him any information concerning "Communist infiltration of the press" at the time of the interrogation, or at any time reasonably proximate thereto; he was *not* asked the question "Do you know whether any Communists are now employed at the Herald Tribune?" or any similar question designed to ascertain whether he had knowledge of present, or reasonably proximate, Communist activity with relation to the press. This question therefore suffers precisely the same infirmities—remoteness in time and subject matter—as do the other questions asked petitioner which he refused to answer.

The identity of individuals engaged in lawful associational and political activities (which is all that was involved here, *Hearings,* p. 1738, JA 47-48) is not "clearly pertinent" to an inquiry into current efforts to influence the contents of the press to the ends of the Communist Party. On the contrary, *Wieman* v. *Updegraff,* 344 U.S. 183 and *Schware* v. *Bar Examiners,* 353 U.S. 232 hold that the fact that an individual has taken part in such lawful political activity, though on behalf of the Communist Party, is *no* evidence that he would practice his profession or conduct himself in employment in a manner so as to serve the purposes of the Communist Party, rather than of his employer.

In *Wieman,* this Court struck down a loyalty oath for teachers, because it had been interpreted by the State Supreme Court as barring from employment individuals who had been members of the Communist Party

(or other organizations listed as "subversive") without knowing the character of these organizations. This Court unanimously held that *"Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."* 344 U.S. 183 at 191. (Emphasis supplied.)[15]

Petitioner in *Schware* had joined the Communist Party in circumstances closely paralleling Whitman's and for largely the same reasons. Compare 353 U.S. 232 at 236 and 244-46 with JA 43-46 (Statement, pp. 7-9). The Court held that his membership constitutes "no evidence * * * which rationally justifies a finding that Schware was morally unfit to practice law."[16]

The scope of review, and thus the standard of pertinency, in *Wieman* and *Schware,* was much slighter than in this criminal case. Lawful political activity is of the essence of First Amendment rights. Thus, the

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[15] That case was decided "in the context of" three decisions upholding the power of the state to exclude disloyal persons from public service. *Id.* at 188. One of these, *Adler* v. *Board of Education,* 342 U.S. 485 had held that "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live." *Id.* at 493. Yet, without disturbing the authority of *Adler* the Court in *Wieman* held that it was arbitrary to draw any inference of present disloyalty from past, unknowing membership. The inference is no more plausible where the individual works for a newspaper.

[16] It is true that Schware left the Party in 1940, and time is a significant factor. Yet the difference of eight years alone does not transmute membership which was *"no evidence"* of present character into a fact "clearly pertinent to" a propensity to slant the news. In *Wieman,* moreover, the oath related to membership "within the five (5) years immediately preceding the taking of this oath," 344 U.S. at 186, and yet *scienter* was held to be constitutionally, because rationally, indispensable.

importance of "cutting off unlawful lines of inquiry" is particularly acute.

We urge further that temporal remoteness is at least as important as spatial remotness, which governed decision in *Deutch* v. *United States, supra* at 470.

In *Bowers* v. *United States,* 202 F. 2d 447, 449 the Court said,

> ". . . we are unable to see how an investigation into the activities of organized crime in interstate commerce which was being conducted in 1951 would be furthered in any way by the subcommittee's knowledge of what business Bowers engaged in in Chicago some twenty-four years before."

The Court also held that a question as to how Bowers had earned money which he had invested nine years before the hearing "may have been in fact in some remote way pertinent to that inquiry, but, if so, the government made no effort to establish that fact." *Id.* at 450.

The activities in which appellant engaged covered the years 1935-1948. The inquiry here was conducted in January, 1956. (J.A. 52). While it is true that the temporal remoteness in *Bowers* is somewhat greater than here, we think it clear that the question put to Bowers did not "enter a field to which the First Amendment is applicable," and that a higher standard of pertinency is therefore here appropriate.[17] More-

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[17] "Although the process of decision in this area, as in most requires more than a mere color-matching of cases," (*Cf. Reck* v. *Pate,* 367 U.S. 433, 442) the decision in *Sherman* v. *United States,* 356 U.S. 369 also illustrates the erosion of pertinency by time. There, "a nine-year old sales [of narcotics] conviction and a five-year old possession conviction [were held] insufficient to prove petitioner had a readiness to sell narcotics at the time"—of the alleged offense, *Id.* at 375.

over, the passage of time has been particularly significant in connection with the Communist Party membership because the nature of the Party and the Government's relation thereto has changed drastically over the years. When petitioner joined the Party and was active in it the Party was lawful and was on the ballot in many States including New York. The first decision of this Court in which the Party was deemed to be a conspiracy was decided in 1950. *American Communications Association* v. *Douds*, 339 U.S. 382. The first Act of Congress directed at the Communist Party became law the same year. We submit that membership in a Party when it is lawful is in no way probative of membership when it becomes unlawful or its subversive nature is known.

In rejecting the remoteness argument as to the first eight counts, the Court of Appeals applied a standard which was too loose to be meaningful. It said that the questions comprising these counts were "clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period of World War II, and such an inquiry *was not without relevance* to Party activities in 1956" (Statement, p. 12 above, (emphasis supplied)). But it is not a proper test that a question is clearly pertinent to a subject *which in turn* is "not without relevance" to the question under inquiry (which the Court apparently thought was Party activities in 1956). Obviously, any question is clearly pertinent to *some* topic; but the statute requires pertinency to the question under inquiry. It is not satisfied by pertinency once removed from that question.[18]

[18] The Court's reasoning on the pertinency of Count 8 also followed this erroneous two-step route.

Counts 3, 4 and 5 were answered by petitioner when he affirmed the truth of answers given the Subcommittee in executive session. *Hearings,* pp. 1741-42. Indeed, Count 6, as set forth in the indictment assumes the answers to these questions. (JA 5). Counts 3 (whether a newspaper was one of the "major newspapers" in New York) and 10 (whether a book had been published by a "Communist publishing house") are void for vagueness. The Sixth Amendment requires that a question which is the subject of a contempt or perjury indictment be sufficiently clear in meaning so that one who desires to answer it truthfully is assured that he can do so. *O'Connor* v. *United States,* 240 F. 2d 404 (CADC); *United States* v. *Lattimore,* 215 F. 2d 847 (CADC); cf. *Louisiana* v. *N.A.A.C.P.,* 366 U.S. 293. The standards for determining what is a "major newspaper" or a "Communist publishing house" are entirely subjective.[19]

A reading of the colloquy in connection with the question in Count 8 leaves little doubt that it, too, was answered. *Hearings,* pp. 1745-46. When a witness, in response to the question "Did you tell anyone you were quitting the party?" spontaneously invokes the privilege of a communication between husband and wife, only a mind determined not to be informed will fail to

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[19] What was the "meaning attached to these terms by the interrogator" (*O'Connor, supra* at 405)? Is the test of a "major newspaper" circulation? Advertising lineage? Number of copy-desks? (See *Hearings,* p. 1730). Degree of opposition to the Eastland Committee? (See JA 56). Is a "Communist publishing house" one which employs present members of the Communist Party, or individuals who had been nonconspiratorial members eight years previously? Is it one which publishes only Marxist-Leninist tracts or only books with the *imprimatur* of an official of the Communist Party?

conclude that he told his wife. Counsel for the Committee clearly understood this, for his next query was "*Other than your wife*, did you tell any person that you were quitting the Communist Party?" *Id.* (emphasis supplied). The claim of privilege was, in any event, well taken. *Wolfle* v. *United States*, 291 U.S. 7; *Blau (Irving)* v. *United States*, 340 U.S. 332.

Count 8 illuminates the whole issue of the proof of pertinency. The District Court had trouble with this question alone (JA 37-38) yet the Court of Appeals relied on it most heavily. See Statement, p. 12, *supra*. The prosecuting attorney, and apparently the District Court at his instance, thought the purpose of the question was to test the credibility of the witness.[20] (JA 37-38). The Court of Appeals thought it "clearly pertained to *the mechanics of party membership* at a time not too distant to be irrelevant to possible present practices" (emphasis supplied). For what it may be worth, we think the question had still a different purpose, to require petitioner to reveal the names of persons whom he had told he left the Party. In other words, it was merely another device by tenacious counsel to extract names from the witness. Whichever view correctly analyzes the thought processes of the inter-

[20] We do not agree that a question is pertinent merely because it tests a witness' credibility. "Pertinency" means "pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation." *Rumely* v. *United States*, 197 F. 2d 166, 177 (CADC) *affirmed*, 345 U.S. 41, quoted with approval in *United States* v. *Orman*, 207 F. 2d 148, 153 (CA 3. Thus, credibility is at least one remove from a proper subject. Further, any question could be justified on that basis, as for example the question whether the witness' counsel is a Communist. (R. No. 9, (*Shelton*), p. 59, n. 12, *supra*). This would entirely destroy the requirement of pertinency. See *Bowers* v. *United States*, 202 F. 2d 447, 452.

rogator, the very abundance of possibilities shows that on this record the basis of pertinency must remain a matter of speculation. Unless the pertinency of a question is clear on its face, it is incumbent upon the Government to present evidence to that effect. *Bowers* v. *United States*, 202 F. 2d 447, 452 (CADC); *United States* v. *Orman*, 207 F. 2d 148, 154-55 (CA 3).

In sum, the position is that petitioner stands convicted of a count (which alone would suffice to sustain the sentence) on one theory of pertinency, his conviction is affirmed on another, and may be defended here on yet a third, since the Courts of Appeals rested on a different question under inquiry than that which the Government has now proffered. None of these theories was set forth in the indictment, mentioned in the opening statement, or supported by anything but the prosecutor's say-so after his case was closed. The defendant's opportunity to defend on the issue was *nil*. Yet in a sense he is better off on this count than on all the rest—as to which the prosecutor might have had one theory, the Trial Court a second, the Court of Appeals a third, and yet all remain hidden.

This case, like *Deutch* can be decided within the "conventional framework of the federal criminal law." 367 U.S. at 472. "Presumption or possibility of pertinency will not suffice." *Bowers, supra* at 448. "One of the rightful boasts of Western civilization is that the [prosecution] has burden of establishing guilt solely of the basis of evidence produced in court . . ." *Deutch* v. *United States*, 367 U.S. at 471 quoting from *Irwin* v. *Dowd*, 366 U.S. 717, 729 (concurring opinion).[21]

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[21] Even in a civil action "speculation cannot supply the place of proof, *Galloway* v. *United States*, 319 U.S. 372, 395"; *Moore* v. *Chesapeake and O. R. Co.*, 340 U.S. 573, 578.

Where the Government has failed to prove the existence of any question under inquiry beyond a reasonable doubt, and the pertinency of the individual questions remains a matter of surmise, the requirements for a conviction under 2 U.S.C. § 192 have not been met.

II. THE CONVICTION MAY NOT STAND BECAUSE PETITIONER WAS NOT ADVISED OF THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE INDIVIDUAL QUESTIONS.

Watkins v. *United States,* 354 U.S. 178 and *Scull* v. *Virginia,* 359 U.S. 344 established as a requirement of due process that a witness be given "a fair opportunity to determine whether he is within his right in refusing to answer" 354 U.S. at 215. Essential to such a determination is that the subject under inquiry and the "connective reasoning whereby the precise questions relate to it" be made known to petitioner. Id. at 214-15.

Here as in *Watkins,* "having exhausted the several possible indicia of the 'question under inquiry' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent." See pp. 21-28, above and App. A. In this Court, the Government has introduced yet another theory. "Certainly, if the point is that obscure after trial and appeal, it was not revealed to petitioner when he had to decide at his peril whether or not to answer." 354 U.S. at 214. The explanations given petitioner were conflicting, but Communist infiltration of the press was not one of them. *Hearings,* pp. 1730, 1737, 1738. The confusion as to the subject of the hearings here is so glaring that there would be no need to elaborate, if the government had not asserted that petitioner nevertheless knew that to have been the subject under inquiry, Opp. cert., pp. 12, 17, 19.

The government imputes to petitioner a knowledge of the statements of the Chairman and others at the outset of the hearing, two days before he testified. (Opp. cert., pp. 11-12)[22] By a parity of reasoning, petitioner must be deemed to have heard Sourwine deny the very topic which the Government now insists petitioner knew, and to have heard Sourwine identify a different topic: Communist activity. This would take the case beyond *Watkins* and *Scull* to *Raley* v. *Ohio,* 360 U.S. 423. "Here there were more than commands simply vague or even contradictory. There was active misleading." Id. at 438.

On the day petitioner testified he heard Senator Hennings' statement, (Opp. cert. p. 12) which has been discussed above (p. 23) and also heard the Chairman say that the Committee was following up the testimony of Clayton Knowles—who had not mentioned Whitman. While the Committee heard several witnesses that day (Opp. cert., p. 12) only one preceded Whitman to the stand—Robert Shelton. See *Hearings* pp. 1717-1728. Since Shelton did not know then, and does not know to this day the reason for calling him—much less the subject under inquiry—Whitman could learn little from attending Shelton's interrogation. Indeed, the explanations given Shelton pointed to yet other subjects. See App. A at n. 7-9 and Brief for Petitioner in No. 9, pp. 17-22.

The Government relies also on petitioner's own statement to the committee. (opp. cert. p. 18, incorporated by reference, opp. cert. p. 12) Petitioner

[22] It is clear that petitioner, who had not been named by Burdett, could not have been enlightened as to the purpose of his own testimony even if he had learned that the hearings resulted from Burdett's.

wrote, "If my testimony is required in aid of the inquiry which your subcommittee is conducting with reference to the beliefs, associations and activities of individuals who are or have been connected with newspapers * * * there is grave doubt whether your Subcommittee is authorized by Congress, or entitled by the Constitution to conduct such an inquiry." *Hearings* p. 1733. Only if "beliefs, associations and activities of individuals who are or have been connected with newspapers" are equated with "Communist infiltration of the press", may knowledge of the latter subject be attributed to petitioner.[22] An inquiry into "beliefs, associations and activities" of any class of individuals would plainly have violated the First Amendment. For "the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be". *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304, quoted and approved in *Torcaso* v. *Watkins*, 367 U.S. 488, 492. Surely the Government cannot contend that the inquiry was what petitioner charged it was. Indeed, the Committee stanchly repudiated his claim that it was conducting "an inquiry into the free press". *Hearings*, p. 1730.

The Government's final reliance, on the questions put to petitioner, (Opp. cert., p. 18) is plainly misplaced in light of *Watkins*, 354 U.S. at 213-14, where only 7 of 30 questions were foreign to the alleged topic, while here more than half ranged outside the press. Having nominated numerous subjects throughout these proceedings, and "Communist infiltration of the

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[22] As this sentence is in the subjunctive, and the previous paragraph refers to petitioners' own beliefs, etc., the inference that it represents what he *knew* to be the topic is highly questionable.

press" only in this Court, the government attributes to petitioner "gifts which mankind does not possess" in asserting that the subject appeared to him with indisputable clarity at the time of the hearings. Cf. *International Harvester* v. *Kentucky*, 234 U.S. 216, 224.

The Court below failed to apply the *Watkins-Scull* principle, on the authority of its *Shelton* opinion, which in turn had relied on *Barenblatt* v. *United States*. But *Barenblatt* distinguished *Watkins* on the facts; it did not disturb the *Watkins* principle. *Id.* at 123-25, as opp. cert. p. 17 concedes. And this case is like *Watkins*, not *Barenblatt*, for Whitman was afforded no explanation of the topic under inquiry, was not identified by any previous witness, or advised why he was called. Compare pp. 3, 22-24, 43, above with 360 U.S. 124-25. Above all, Whitman, like Watkins, but unlike Barenblatt (*Id.* at 125) answered all questions about his own Party membership and limited his refusal to identifying his associates—whose pertinency remains in doubt even now.

Petitioner's statement explicitly raised the pertinency issue:

> "Neither the subpena nor the letter [continuing the subpena] stated the purpose for which my testimony is required."
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> * * * * *
>
> "I respectfully submit that my private affairs, beliefs and associations are not proper subjects for investigation by this subcommittee. Their pertinence to any valid legislative inquiry is in serious doubt * * *" (*Hearings*, p. 1733)

His doubts as to why he had been called and the pertinence of the questions were repeated orally. (*Id.* at

1735) Petitioner's pertinency objection was thus much clearer than Watkins', 354 U.S. at 185, and of course, than Barenblatt's, 360 U.S. at 123. Even if the protest must be made in some form, the witness "could not be expected to speak with legal exactness" *Hale* v. *Henkel*, 201 U.S. 43, 71 (refusal to produce papers on advice of counsel that witness was, under the circumstances not obliged to produce them, held sufficient to raise Fourth Amendment defense); *Quinn* v. *United States*, 349 U.S. 155, 170. (No particular form of words required to present objection.)

III. THE SUBCOMMITTEE WAS WITHOUT AUTHORITY TO QUESTION PETITIONER; IF IT HAD AUTHORITY IT WAS NOT MADE KNOWN TO HIM.

A. The Subcommittee's Lack of Authority to Conduct This Inquiry

The indictment alleges that the Subcommittee's hearings were conducted pursuant to Section 102(1)(k) of the Legislative Reorganization Act of 1946 and Senate Resolutions 366 of the 81st Congress and 58 of the 84th. The Legislative Reorganization Act creates and continues the Standing Committees of both Houses of Congress and defines their jurisdiction. Section 102(1)(k) describes the powers of the Senate Judiciary Committee. Neither Section 102(1)(k) nor any other section of the Act gives any powers to the Internal Security Subcommittee or any other subcommittee of a standing committee. The Senate Resolutions referred to in the indictment make no mention of the Internal Security Subcommittee. This was no accident. The Judiciary Committee resolved that the Internal Security Subcommittee be continued and that "an appropriate original resolution" be reported to the Senate for that purpose (Gov't Ex. #3); such a resolution—

referring to the Subcommittee by name—was introduced. However, the Rules Committee expressly changed its language to read "the Judiciary Committee or any subcommittee thereof", and it was passed in this form. 101 Cong. Rec. 3174-5. The Rules Committee's purpose was plainly to restrict the delegation from the Senate to the Judiciary Committee, consistent with the general policy that only Standing Committees are empowered directly by the Senate. Since members of standing committees are elected by the respective bodies and members of subcommittees are chosen informally, either by the Committee or its Chairman (as here, JA 18) this distinction is substantial. The Rules Committee deemed it sufficiently important to alter the language of the resolution in order that the authority of the Senate should run directly to the Judiciary Committee which was in turn required to empower "any subcommittee" to investigate the Internal Security Laws, etc., as Sen. Eastland acknowledged.[24] There is nothing in the record that the Judiciary Committee ever did so, although its intention can perhaps be divined from Ex. #3. What is clear is that the Resolution relied on in the indictment did not authorize—indeed it deliberately denied authority to—the Internal Security Subcommittee to undertake *any* investigation.

In view of the ambiguity of clause (3) of the Resolutions there is no way of knowing whether the Senate authorized the particular inquiry in this case. In *Watkins*, 354 U.S. 178 at 205 this Court held that

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[24] During the same debate Sen. Eastland, justifying a request for additional appropriations pointed to new procedures adopted by the Subcommittee at the instance of the full committee. 101 Cong. Rec. 3175.

"Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." *Barenblatt*, 360 U.S. 109 did not refute this proposition. See *Wilkinson*, 365 U.S. at 407. Rather, *Barenblatt* held that such authorization can be found in the "legislative gloss" of the Committee's history. *Id.* at 117-22. Even if there is a similar gloss here, as is argued at opp. cert. pp. 10-11, it is clear from the foregoing that the authorization was from the Senate to its Judiciary Committee. That Committee's resolution in Ex. #3, even if had been revived after the passage of S. Res. 58, states nothing about an investigation into "Communist infiltration of the press", or any other subject. If the Subcommittee's authority is defined in that resolution *none of the questions which are the subject of this indictment were authorized.* For that resolution refers only to the Administration of the Internal Security Act and Other Internal Security Laws (Compare clauses (1) and (2) of Resolutions 366 and 58) each of which was passed after petitioner left the Communist Party and after the time encompassed in those questions.

Finally, the record leaves no doubt that the Subcommittee itself never met to authorize this inquiry. Sen. Hennings so stated, without contradiction. *Hearings*, p. 1588. Its rules require the approval of a majority of the subcommittee before any "major investigation" is undertaken. See R. No. 9, p. 140. When thirty witnesses are called for a series of hearings, and eighteen of them are recalled, we think that this is a "major investigation" by any reasonable definition. (But see the testimony of Sourwine, J.A. 37.)

In that event the *Accardi-Service-Vitarelli*[25] principle would require the Subcommittee to follow its own rules. We see no tenable distinction between Executive departments and Congressional committees and subcommittees in the application of that principle. Indeed, the abandonment of the rule is more serious here, since the revision of the rules was at the behest of the parent committee, and the Senate had been advised of the fact, though not the substance of changes 101 Cong. Rec. 3175, n. 24 *supra*.[26]

Even in the absence of a rule such as the Subcommittee's we submit that an inquiry that is not voted by a majority of the Subcommittee may not compel testimony. Unless the Subcommittee has acted there is a break in the chain of authority from the House or Senate through the Standing Committee to the Subcommittee. This is not a technical notion. *Watkins, supra* at 200-01. The record shows that this investigation was instituted and executed by the Counsel of the Subcommittee with only minimal supervision from one Senator (the Chairman) and without the knowledge of the rest of the Subcommittee, or the Judiciary Committee, which was responsible to the Senate, which alone has plenary authority under the Constitution. To give one individual, who is without a mandate from or responsibility to the people, such

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[25] *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535.

[26] Moreover, the rule was plainly intended to protect the right of all members to participate in the decision to conduct any investigation, thus going beyond a self-imposed restriction on the power of a cabinet member as in the cases cited in the previous note. The record shows that Sen. Hennings was gravely concerned about some of the proceedings but was powerless to interfere once the witnesses had been called.

power to interfere with the privacy of the citizen is a dangerous affront to liberty unjustified by any countervailing legislative need.

B. The Committee Failed to Reveal the Source of Its Authority

The holding of *Watkins* v. *United States,* 354 U.S. 178, that a witness is entitled to be informed of the subject under inquiry and the relation of the individual questions to that subject was derived from two principles: 1) that a citizen has "the right to have available, through a sufficiently precise statute, information revealing the standard of criminality before the commission of the alleged offense" and 2) the pertinency of the questions is part of the standard of criminality under 2 U.S.C. § 192. *Id.* at 208. When the settled proposition that the authority of the committee is also part of that standard (*United States* v. *Rumely,* 345 U.S. 41; *Sacher* v. *United States,* 356 U.S. 576; *Barenblatt* v. *United States,* 360 U.S. 109, 116-123) is substituted for the minor premise in this syllogism, a conclusion parallel to the *Watkins* holding is compelled: ***A witness may not be convicted for a violation of 2 U.S.C. § 192 unless he is apprised of the basis of the investigating committee's authority to question him.***

The precise outlines of the obligation which this rule imposes on a committee need not be traced here; at a minimum the committee must reveal to the witness the source of its authority and the relationship of the inquiry and the individual questions to that authorization. On this record it is plain that the Committee failed to comply with either of these conditions of due process.

The subpoena which "commanded" Whitman's appearance invoked "lawful authority" but failed to define it. At no time during the hearings—in petitioner's presence or his absence—did any member or representative of the Sub-committee refer to Senate Resolution 366 or 58 or to any other alleged source of power to compel his testimony.

If petitioner had been made aware of the resolutions which are the Government's main reliance here, he still could not have determined whether they authorized the particular inquiry which was being conducted, and whether they authorized the committee to coerce him to inform against his associates in past lawful political activity. The courts cannot decide whether an interrogation is authorized unless they know the subject under inquiry (*Wilkinson* v. *United States*, 365 U.S. at 409); neither can a witness, who must decide at his peril, subject to the stresses of a Committee interrogation. That this witness did not and could not know the subunder inquiry has already been amply demonstrated. (pp. 21-26, 43-45 supra).

Even if the subject under inquiry had been identified, Whitman would have been unable to calculate whether he was free to decline to answer. For, as we have already noted, and as we understand the government to have conceded in the *Sacher* case,[27] Resolutions

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[27] "Petitioner, referring to Senate Resolution 366 . . . creating the Internal Security Subcommittee, argues . . . that 'a claim that the resolution clarify the pertinency of the questions would be absurd'. Of course, we make no such claim. The resolution, defining the general boundaries of the Subcommittee's jurisdiction, authorized and empowered the committee to undertake the inquiry in which it was engaged when Matusow originally testified before it . . . as well as the inquiry into the circumstances surrounding

366 and 58 are so vague that a witness cannot understand whether they encompass any given topic or individual questions. See pp. 47-48 *supra*. Yet, "the scope of inquiry that a committee is authorized to pursue must be defined with sufficient uambiguous clarity to safeguard a witness from the hazard of vagueness . . . against which the Due Process clause protects." *Watkins* v. *United States,* 354 U.S. at 217 (concurring opinion).

In his prepared statement, and orally, petitioner clearly and insistently questioned the Committee's authority to interrogate him as it did. (*Hearings*, p. 1733-34, 1735, 1737). Since the Committee failed to apprise him of purported foundation of its power to compel his testimony petitioner was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process clause of the Fifth Amendment." *Watkins, supra* at 215.

IV. PETITIONER WAS JUSTIFIED BY THE FIRST AMENDMENT IN REFUSING TO ANSWER THE QUESTIONS ASKED HIM.

As early as *Burnham* v. *Morrissey,* 14 Gray 266 (Mass.), Chief Justice Shaw held that

> "The [Massachusetts] House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the citizen are concerned, but the legality of its action may be determined by this Court."

Matusow's later recantations of that testimony, but the pertinency of the questions which petitioner refused to answer during the course of the latter inquiry is to be determined, as it is proper to do (*Watkins* v. *United States,* 354 U.S. 178), from the entire complex of circumstances attending their asking." Brief for the United States in Opposition, *Sacher* v. *United States,* No. 828, October Term, 1957, p. 16, n. 6.

Nor has any subsequent case cast doubt on the rule in *Kilbourn* v. *Thompson,* 103 U.S. 168, 181 that

> "Conceding for the sake of argument that there are cases in which . . . the Congress of the United States may punish for contempt of its authority, or disregard of its orders, it will scarcely be contended by the most ardent advocate of their power in that respect that it is unlimited."

And see *Sinclair,* v. *U. S.,* 279 U. S. 263, 292; *Quinn* v. *U. S.,* 349 U. S. 155, 161; *U. S.* v. *Rumely,* 345 U. S. 41, 44, 56; *Watkins* v. *United States,* 354 U. S. 178, 198.

Barenblatt v. *U. S.,* 360 U. S. 109 teaches that "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs" (*Sinclair, supra,* at p. 292) is to be weighed in the light of the competing public and private interests at stake. Unlike our earlier argument with reference to pertinency, which involves a problem of statutory construction, this is, as this Court pointed out in *Barenblatt,* a problem of Constitutional adjudication. And unlike *Barenblatt,* we say that in this case the Congressional and public interest in disclosure was *de minimis* and the "personal and private" interest of the witness was very great.

Petitioner, like Watkins and Deutch, but unlike Barenblatt, Wilkinson and Braden, discussed fully his own membership in the Communist Party and refused only to give information which would reveal the identity of his associates. We submit that the distinction is one which goes to the heart of the associational rights which are guaranteed by the First Amendment.

See, e.g. *De Jonge* v. *Oregon*, 299 U.S. 353; *Scull* v. *Virginia*, 359 U.S. 344.[28]

This Court has recognized the difference between the hard core conspiratorial leadership of the Communist Party, and the hundreds of thousands of well-intentioned law-abiding citizens whose membership was overt and not conspiratorial, and who believed it to be, and participated on the basis that it was, a lawful political party. *Konigsberg* v. *State, Bar* 353 U.S. 252; *Schware* v. *Bar Examiners*, 353 U.S. 232; *Wieman* v. *Updegraff*, 344 U.S. 183. See also authorities cited in Brief for Petitioner, *Deutch* v. *United States* No. 233 Oct. Term, 1960, p. 45, n. 17. Petitioner testified, and offered to prove at trial that his own activity, and that of his associates consisted entirely of lawful political activity, entirely unconnected with overthrow of the government (JA 39-52). He told the Committee that he had "never taken part in any conspiracy." *Hearings* p. 1738. Of course, petitioner's First Amendment rights must be judged on the basis of his own conduct and that of his associates. *Wieman* v. *Updegraff*, *supra*; *Scales* v. *United States*, 367 U.S. 203, 224-25. It is entirely plain that he was unable to give any information to the committee that would enable it to ferret out subversion of the press, espionage, sabotage or attempts to overthrow the government. Our discussion with reference to pertinency (pp. 28-42 supra) has application here as well. *Scull* v. *Virginia*, 359 U.S. 344,

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[28] This point has previously been ably briefed by counsel for petitioners in *Watkins* and *Deutch*. We shall not burden the Court by repetition of their arguments, but respectfully incorporate them by reference in our discussion herein. See Brief for Petitioner, No. 261, Oct. Term 1956, pp. 96-119; Brief for Petitioner, No. 233, Oct. Term 1960, pp. 44-50.

352-53. It demonstrates that the public interest to be served by compelling petitioner to inform approaches, if it does not equal, zero.

At no time did any member of the Committee, or its Counsel, attempt to set forth the value to the Congress or the public of the disclosure of the names of persons who, many years before, had engaged in lawful rather than conspiratorial activity.

The petitioner's interest in non-disclosure was as urgent as the Government's interest in answers was fragile. Having answered all questions concerning himself and his activities, his reason for refusing to answer was that "I knew of my own knowledge of people who had lost jobs, whose careers had been wrecked, whose families had been upset, whose children had been dislocated, purely because they had been exposed to the committee by somebody for what in its time was perfectly legal activity and I felt that it would be a mean and ignoble thing if I would be the vector, the agent to bring destruction on people. . . ." (JA 53).

Precisely such consequences were held to privilege non-disclosure of associations in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Bates* v. *Little Rock*, 361 U.S. 515; and *Shelton* v. *Tucker*, 364 U.S. 479.[20] That individ-

[20] In *Communist Party* v. *Control Board*, 367 U.S. 1, these cases were said to "hold that where the required making public of an organization's membership lists bears no rational relation to the interest which is asserted by the State to justify disclosures, and where because of community temper publication might prejudice members whose names were revealed, disclosure cannot be constitutionally compelled." Id. at 101.

The Government argues that this case is like *Bryant* v. *Zimmerman*, 278 U.S. 63 rather than *N.A.A.C.P.* and its progeny.

uals whose past membership in the Communist Party is exposed may suffer serious social and economic injury is indisputable. Cf. *Schware* v. *Bar Examiners,* 353 U.S. 232; *Konigsberg* v. *State Bar,* 353 U.S. 252; *Greene* v. *McElroy,* 360 U.S. 474; Cogley, *Report on Blacklisting* (1956); Cushman, *Civil Liberties in the United States,* pp. 203-204 (1956).

In the circumstances no one, we feel, can challenge the purity, and to many citizens, the laudability, of this challenge to the Committee's authority. "... it seemed to me that one of the great heritages and privileges that I had as a citizen in a democracy was that of personal responsibility for my acts ... I felt sir, that as a matter of inner conscience here, that I could not disclose the names of innocent people in order to be of possible benefit to myself."

We suggest that no more compelling private interest will ever be found. Witnesses may refuse to answer questions out of shame, or from fear, or mere contumacy, or outright defiance; it is probably true that most refusals to answer stem from ignoble considera-

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Opp. cert. p. 16, n. 10. But the suggestion that *Bryant* applies because this case involves membership in the Communist Party (id.) is too facile. In *Communist Party* v. *Control Board* the distinction was in terms of the "nature of the organization regulated, and hence the danger involved in its covert operation," 367 U.S. 1 at 101. Where "secrecy itself is made an active instrument of public harm" exposure serves a public purpose. But the activities of petitioner and his associates were, as he offered to prove, not secret. They consisted principally of attendance at public meetings which were open to anyone who wished to attend. There was nothing clandestine about petitioner's membership in the Communist Party, he and his associates used their right names at all times, and his friends and associates knew that Whitman was a member. (JA 47).

tions. But the person of conscience, high principle, and imagination, which we feel petitioner by his acts demonstrated himself to be, will not consent to yield his personal integrity to the tug of a meddling officialdom. We assert that no private interest can rise in dignity and selflessness above this. If the desire to protect innocent persons from unjustified harm is not sufficient a private interest to warrant silence, then we say that the First Amendment can under no circumstances be a shield, that *Barenblatt* means that any public interest, no matter how trivial or remote, can always prevail over every private interest in non-disclosure, and that Congressional committees have a license to hunt where they will. This Court has never so held, and we trust it never will.

The case most closely touching this is not *Barenblatt,* but *Board of Education* v. *Barnette,* 319 U.S. 624. There as here the State, asserting an overriding interest, sought to compel an act contrary to the citizen's conscientious scruples. Petitioner's principles and tenets, which would have been violated had he accepted the role of an informer, have deep roots[30] and rise to at least an equal dignity to the grounds on which the children in the *Barnette* case refused to salute the flag. Similarly, the Committee's interest in learning the names of petitioner's associates, even if hospitably viewed, is insignificant compared to the interest in national unity—during wartime—which was held to be insufficient to outweigh the First Amendment in *Barnette.*

Barenblatt, supra at p. 127, makes it entirely clear that the force of these countervailing private and pub-

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[30] "The talebearer shall defile his own soul, and be hated by all" *Book of Ecclesiastes,* xxi, 31.

lic interests is to be judged in the "particular circumstances shown." We do not ask this Court to lay down any sweeping rule that informer questions may never be pertinent or that they necessarily intrude on rights protected by the First Amendment. We urge that the public interest, in these "particular circumstances," in procuring answers was so remote and feeble as to be entirely outweighed by the petitioner's altogether understandable compulsion not "to become in my own eyes an ignominious person . . . I feel deeply that I would utterly lose my self-respect were I to violate the terms of my own inner integrity." We believe that the First Amendment does not permit that this be rendered up to Caesar. The petitioner's humane decency is a value more rare and precious, more deserving of respect and cultivation, than is the petty sadism of the officious inquisitor, quietly rubbing pepper in the eyes of his prisoners.

V. THE INDICTMENT WAS INSUFFICIENT TO STATE AN OFFENCE.

The indictment omitted to define the question under inquiry, the basis of pertinency of the individual questions or the authority of the subcommittee. In each of these elements it failed to meet the requirement of Rule 7(c) of the Federal Rules of Criminal Procedure that "the indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The underlying principles regarding the sufficiency of an indictment are developed by petitioner in *Russell* v. *United States*, No. 8, this Term, and, in deference to the convenience of the Court, will not be elaborated here.

It bears emphasis, however, that Rule 7(c) is unique in that it embodies two constitutional principles: (1) a defendant in a criminal case must be "informed of the nature and cause of the accusation" (Sixth Amendment, incorporated also in the due process clause of the Fifth[21]); (2) "none shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury" (Fifth Amendment). The constitutional provision for notice means that "an indictment must charge an offense with such reasonable certainty that the accused can make his defense." *United States* v. *Lattimore*, 215 F. 2d 847, 849 (CADC) citing *United States* v. *Cruikshank*, 92 U.S. 547. And "No person shall be required according to the fundamental law of the country . . . to answer for any of the higher crimes unless this body [the grand jury] shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex Parte Bain*, 121 U.S. 1, 11 quoted with approval in *Stirone* v. *United States*, 361 U.S. 212, 218, n. 3.[22]

We shall now show that the indictment in this case thwarts both constitutional policies which Rule 7(c) intended to serve.

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[21] *DeJonge* v. *Oregon*, 299 U.S. 353; *Cole* v. *Arkansas*, 333 U.S. 196.

[22] We need not consider, in construing Rule 7(c), whether the Constitution requires an indictment in a prosecution for violation of 2 U.S.C. § 192. For this rule establishes the same standard of a "plain, concise and definite written statement of the essential facts" for both an indictment and an information.

(a) The "Question Under Inquiry"

An indictment which fails to identify the "question under inquiry" by which the prosecution will contend pertinency is to be measured is almost useless to give notice to a defendant in a prosecution under 2 U.S.C. § 192. In *Wilkinson* v. *United States*, 365 U.S. 399, 409 this Court delineated five issues which can be considered only if the "question under inquiry" is known.[33] Even if one or more of these is a matter of defense in individual cases, two are indispensible elements which the Government must affirmatively establish in every case—the authority of the Committee to conduct the inquiry and pertinency of the individual questions. *United States* v. *Rumely*, 345 U.S. 41; *Sacher* v. *United States*, 356 U.S. 576; *Deutch* v. *United States*, 367 U.S. 456. He must be given the opportunity to meet the allegation that the question under inquiry was the one relied on by the government to prove these elements of the offense. That the identity of the question may be critical is demonstrated by *Deutch* v. *United States*, 367 U.S. 456, where the difference in conclusion between the majority opinion of Mr. Justice Stewart and the dissenting opinion of Mr. Justice Whittaker resulted from their disagreement as to the question under inquiry.[34] A fact which controls five issues in the case, and which may be dis-

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[33] "First, was the subcommittee's investigation of these subjects, through interrogation of the petitioner, authorized by Congress? Second, was the subcommittee pursuing a valid legislative purpose? Third, was the question asked the petitioner pertinent to the subject matter of the investigation? Fourth, was he contemporaneously apprised of the pertinency of the question? Fifth, did the subcommittee's interrogation violate his First Amendment rights of free association and free speech?"

[34] Compare 367 U.S. at 469-70 with *id.* at 481.

positive of the outcome is plainly an "essential fact constituting the offense charged" which Rule 7(c) requires to be stated in the indictment.

This case and its companions dramatically illustrate the importance of defining the "Question under inquiry" in the indictment. The vacillations of the Government as to this issue from trial to appeal to the petition for certiorari, whose prejudicial effect is clear,[35] would have been averted if the indictment

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[35] The harmful consequences of the variance between the government's positions at trial and on certiorari are outlined at p. 28 *supra*. Moreover, since the lower courts entered and affirmed the conviction on grounds other than that "communist infiltration of the press" was the "question under inquiry" they would have been compelled to acquit petitioner if that topic had been specified in the indictment.

The Government contends that "since during petitioner's own testimony both he and the subcommittee made clear that they understood that Communist infiltration of the press was the subject under inquiry * * * he could not have been prejudiced by the lack of greater specificity." Opp. cert. p. 19. Perhaps the least vice of this argument of desperation is that its factual predicate is false. See pp. 21-26, 43-45 *supra*, showing that petitioner had no such knowledge. If he had possessed the information ascribed to him, he knew more about the Committee's purposes than its counsel (who had stoutly denied this topic, and claimed a different legislative purpose) or the prosecuting attorney (who insisted that there was no such narrow topic) or the Trial Judge (who convicted on the assumption that the Committee was investigating "the history of the Communist Party" and its activities, J.A. 55).

A more fundamental objection is that the Government is trying to lift itself by its own bootstraps. Petitioner's knowledge, and whether he was properly apprised of the subject, were issues at the trial. Compare *Barenblatt*, 360 U.S. 109, 124-25 with *Watkins*, 354 U.S. 178, 214-15. The identity of the question under inquiry is critical to this issue as well. *Wilkinson*, 365 U.S. 399, 409, quoted at n. 33 *supra*. Thus, the Government's blithe assumption that petitioner knew the subject under inquiry and was therefore not injured by the open-ended indictment serves rather to accentuate the severity of its prejudice to his defense.

had specified the topic. *Stirone* v. *United States*, 361 U.S. 212, teaches that a variance between the indictment and the proof would vitiate the conviction, as the Government virtually concedes. Supplemental Memorandum for the United States (on Pet. for Cert.), *Shelton* v. *United States*, No. 9, this Term, p. 5, n. 3. If, as the Government claims in *Shelton*, it is not bound by the bill of particulars, and the bill can subsequently be reinterpreted on the basis of what the Assistant United States Attorney "apparently meant" *id.* p. 4, there is all the more reason for requiring the government to state the subject in the indictment, by which it is bound. If, as said in *Wilkinson*, 365 U.S. at 407 and reaffirmed in *Deutch*, 367 U.S. at 469 the "starting point" of analysis is to determine the subject of the investigation an indictment which leaves that subject unclear severely frustrates the defense. Moreover, if we are correct in asserting (pp. 20-28 *supra*) that the question under inquiry is itself an element of the offense which must be proven, the government's obligation to allege the question is incontrovertible.

An indictment which leaves the question under inquiry open also destroys "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . . The very purpose of [this] requirement is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U.S. 212, 217-18. If this Court must first determine the question under inquiry to determine whether the committee was acting within its authority and whether the questions were proven to be pertinent, must not the Grand Jury know the question in order to determine probable cause

that a violation was committed? "The grand jury might not have been willing to return an indictment with a charge conforming to the proof actually introduced". Supplemental Memorandum for the United States, *Shelton* v. *United States,* No. 9, this Term, p. 5, n. 3. Indeed, it is readily inferable that the Grand Jury's understanding of the "question under inquiry" differs from the theory by which the Government here seeks to preserve the conviction. The Assistant United States Attorney tried each of the New York *Times* cases on the hypothesis that the subject under inquiry was as broad as the authorizing resolution. He so advised the Courts and the defendants. See Appendix A, text and notes at n. 16-21. It is inconceivable that he informed the Grand Jury that "communist infiltration of the press" or any other limited topic was the real question under inquiry.

(b) The Pertinency of the Individual Questions

The need for an explanation of the pertinency of the individual questions is perhaps not as clear as that of a definition of the topic under inquiry. However, the conflicting views of the trial court and the Court of Appeals as to the basis of Question 8, both of which differ from petitioner's assumption (see p. 40, *supra*) illustrate the hazards of leaving this matter open. And, of course, the Grand Jury must have a theory of pertinency in order to determine probable cause.

(c) The Authority of the Subcommittee

Since the authority of the subcommittee is an element of the offense, the basis of that authority must be pleaded, *United States* v. *Lamont,* 236 F. 2d 312 (C.A. 2) so holds, and we do not understand the government to dispute it.

It is true, as the government says (opp. cert. p. 19, n. 14) that the indictment states that the hearings were conducted pursuant to Resolutions 366 of the 81st Congress and 58 of the 84th. Our point is that the prosecution may not go beyond these allegations, as it attempted to do by the testimony of Sourwine regarding Ex. 3 and the minutes of the Judiciary Committee, etc. (See J.A. 15-22) "An allegation for lack of which the prosecution must evidently and as a matter of law fail cannot be regarded as superfluous." *Lamont*, supra at 315. As in *Lamont* "There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee." *Id.* For the resolutions cited in the indictment give no authority to the subcommittee to conduct this or any other inquiry. See pp. 46-50, *supra*. Thus, the indictment simply failed to state an offense.

A holding that indictments must define the question under inquiry and the pertinency of the individual questions and must state fully the alleged basis of the subcommittee's authority would create no difficulties for the prosecution of contempts of Congress. Such prosecutions presume a citation by a House of Congress at the request of the affected Committee.[36] That Committee's report can readily state the question under inquiry and the purpose of the individual questions which are the basis of the citation. It will be impossible for the Government to comply only if there was no "question under inquiry". We suspect that this is the real first cause of the Government's difficulties in the New York *Times* cases. But the com-

[36] See, e.g., Gov't Ex. 6 which is the Judiciary Committee's report in this case.

mittee's power to compel a response is predicated on the existence of a "question under inquiry", a legislative purpose for the separate questions and authorization of the inquiry. Thus, if this Court holds that indictments under 2 U.S.C. § 192 must fully plead these elements it will inhibit only invalid prosecutions. But it will assure that in "fulfillment of their obligation under this statute the courts [will] accord to the defendants every right which is guaranteed to defendants in all other criminal cases." *Watkins* v. *United States,* 354 U.S. 178, 208; *Deutch* v. *United States,* 367 U.S. 456, 471.

CONCLUSION

By reason of the foregoing the judgment of conviction should be reversed.

Respectfully submitted,

GERHARD P. VAN ARKEL
GEORGE KAUFMANN
Attorneys for Petitioner

VAN ARKEL AND KAISER
1730 K Street, N. W.
Washington 6, D. C.
Of Counsel.

APPENDIX A

SUMMARY OF ALLEGED QUESTIONS UNDER INQUIRY

	SHELTON	WHITMAN	PRICE	PECK
STATEMENTS OF COMMITTEE MEMBERS BEFORE HEARINGS (Not in Presence of Present Petitioners)	"Subsequent chapter to the Burdett testimony[1]—"not an attack upon the free press"[2]—attempt of Communist party to influence or subvert American press[3]—"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it"[4].			
STATEMENTS BY COMMITTEE COUNSEL SOURWINE TO OTHER WITNESSES	*Not* investigation into "Communist infiltration of the press and other forms of communication"[5]—"the subject matter of the Committee's inquiry is Communist activity"[6].			
STATEMENTS BY COMMITTEE TO WITNESSES (Open Hearings)	"Your employment"[7]—"Whether you are a member of the conspiracy to destroy the government of the United States"[8]—credibility of witness[9].	"Your standing and influence in the organization" [New York Times][10]—membership of Communist cell in New York City in 1930's[11]—"who your associates were in the Communist Party"[12].	To qualify witness to answer questions regarding slate of candidates in Newspaper Guild election[13]—testing the credibility of the witness.[14]	No explanation to witness.[15]
INDICTMENTS	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.
STATEMENTS OF PROSECUTOR	"the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose."[16]	Communist activities in New York area in the field of strategy and tactics of world communism—"internal security and national security of the United States"[17].	"rout out communists and locate them wherever they are"[18]—"find where communists were, wherever they may be found"[19]. Powers of subcommittee "at least as broad as any that the full committee had already and perhaps a little more broad"[20].	"'The full committee powers' or the entire scope of the authorizing resolution"[21].
TESTIMONY OF COMMITTEE COUNSEL	"extent and activities of the communist conspiract against the United States, more specifically, as it applied to New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees."[22] "Communist activity and infiltration of mass communications in New York City".[23]	Communist espionage—operations of the Communist Party—strategy and tactics of world communism particularly in area of mass communications[24]—conspiracy to overthrow the government of the United States by force and violence[25].	Strategy and tactics of Communist Party[26]—important whether witness had signed in 1941 a statement in defense of the Communist Party[27]—Not lawful political activities of members of Communist Party[28].	"We were after each Communist cell that we could find in any industry in the United States, and we were after them to get a picture of it as a basis for legislation"[29].
DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies"[30].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party	Court refers only to "the internal security; in fact the national security, of this country"[31].	"Communist infiltration into mass communications".[32]

DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies"[30].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities"[31].	Court refers only to "the internal security; in fact the national security, of this country"[32].	"Communist infiltration into mass communications".[33]
GOVERNMENT BRIEFS IN COURT OF APPEALS	Government relies entirely on Senate resolution and statements made before the hearings[34].	Communism[35].	Government relies entirely on Senate resolution and statements made before the hearings[36].	Acquitted.
DECISIONS OF COURT OF APPEALS	"infiltration of Communists into the radio, TV, and the press."[37]	Mechanics of party membership[38].	Not stated[39].	Acquitted.

[1] Hearings, page 1587.
[2], [3], [4] Ibid.
[5] Hearings, page 1616 (colloquy during testimony of James S. Glaser).
[6] Hearings, page 1652 (colloquy during testimony of Jerry Zalph).
[7] Hearings, page 1721 (R. No. 9, page 85).
[8] Hearings, page 1725 (R. No. 9, page 91).
[9] Hearings, page 1727 (R. No. 9, page 93).
[10] Hearings, page 1730.
[11] Hearings, page 1737. Chairman stated this to be "The very heart of this inquiry."
[12] Hearings, page 1738.
[13] Hearings, page 1681.
[14] Hearings, pages 1695–6.
[15] Hearings, pages 1774–1784.
[16] Prosecutor's oral Bill of Particulars (R. No. 9, page 20). See also R. 17–18, 40.
[17] Transcript *United States* v. *Whitman* (Criminal 1213–56 DC DC) p. 6.
[18] Joint Appendix (J.A.) No. 12, p. 133.
[19] Id., p. 134.
[20] Id., p. 49.
[21] Quote in *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[22] R. No. 9, page 139.
[23] R. No. 9, pages 156–7.
[24] J. A. No. 10, p. 31.
[25] Id., p. 32–33.
[26] J. A. No. 12, p. 54.
[27] Id., p. 103. (See also pp. 117–18, 127 and 128.)
[28] Id., p. 85.
[29] Transcript in *United States* v. *Peck*, Criminal 1214–56, page 235 (testimony of Senator Eastland, Chairman of Committee).
[30] R. No. 9, pages 224–5.
[31] J. A. No. 10, p. 54–55.
[32] Tr. 331-2 of trial record in *United States* v. *Price* (DCDC).
[33] *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[34] Brief for Appellee, *Shelton* v. *United States* (CADC 13737, pages 2–4).
[35] Brief for Appellee, *Whitman* v. *United States*, (CADC 15416, pages 10–11, 13, 14).
[36] Brief for Appellee, *Price* v. *United States*, (CADC 13925, pp. 2, 4 and 20).
[37] R. No. 9, page 243.
[38] *Whitman* v. *United States*, 291 F. 2d 59, 61. This determination was made with regard to question no. 8 in the indictment. The Prosecutor had told the District Court that the purpose of this question was to test the credibility of the witness. The Court of Appeals did not state what it believed was the purpose of the inquiry generally.
[39] Compare *Deutch* v. *United States*, 367 U.S. 456, 467.

APPENDIX B

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law • • • abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be • • • deprived of life, liberty or property without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right • • • to be informed of the nature and cause of the accusation • • •."

Rule 7(c) Federal Rules of Criminal Procedure, provides in pertinent part:

> "The indictment or the information shall be a plain concise and definite written statement of the essential facts constituting the offense charged. . . ."

2. U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress

to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the World Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"*Resolved,* That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

Senate Resolution 58, 84th Cong., 1st Sess. provides:

"*Resolved* that in holding hearings, reporting such hearings, and making investigations as authorized by section 134 of the Legislative Reorganization Act of 1946, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate, insofar as they relate to the authority of the committee to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, it Territories and possession, including but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist move-

ment or any other movement seeking to overthrow the Government of the United States by force and violence, the Committee on the Judiciary, or any subcommittee thereof, is authorized from March 1, 1955, through January 31, 1956 (1) to make such expenditures as it deems advisable; (2) to employ on a temporary basis such technical, clerical, and other assistants and consultants as it deems advisable; and (3) with the consent of the heads of the department or agency concerned, to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

SEC. 2. The expenses of the committee under this resolution which shall not exceed $260,000 shall be paid from the contingent fund of the Senate by vouchers approved by the chairman of the committee.

SEC. 3. This resolution shall be effective as of March 1, 1955."